

Small Business Friendly Regulation

Model Legislation for States

December 2002

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Office of Advocacy

U.S. Small Business Administration

Washington, D.C.

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Foreword

The mission of the U.S. Small Business Administration's Office of Advocacy has always been to help reduce the regulatory burden placed on small business. While the focus of that activity has been mostly at the federal level, Advocacy recognizes that state and local governments can also be a source of burdensome regulations.

From 1978, when the first Advocacy conference of state small business leaders convened, to the more recent Vision 2000 conference, Advocacy has provided a forum where state officials could come together and exchange ideas on programs that would help—not harm—the small business climate.

A 2001 study funded by Advocacy, *The Impact of Regulatory Costs on Small Firms*, by W. Mark Crain and Thomas D. Hopkins, shows that small businesses spend nearly \$7,000 each year per employee to comply with federal regulations. That is \$2,500 more per employee than large firms spend. President Bush has an active and aggressive small business plan that includes reducing federal regulatory burdens on small business.

For that reason, the Office of Advocacy now presents draft model regulatory flexibility legislation for consideration by state legislatures. Many states have some provisions that deal with this subject. Few, however, have a complete package that includes all of the important components. These ingredients are: specific focus on small business; economic impact analysis; a requirement for the examination of less burdensome alternatives; a periodic accounting of regulations that affect small business; judicial review; and a dedicated office within the executive or legislative branch of state government that leads the effort towards regulatory flexibility for small employers.

The model legislation offered here should undoubtedly go through modifications to fit the needs of particular states. Nonetheless, the objective in all states will be the same: to foster a climate in which small business can continue to thrive and prosper in order to remain the viable economic force it has always been. That is the Advocacy's motivation for making these materials available to all. Special thanks to Jaime Willis for preparing this report.



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Regulatory Flexibility: What it is and Why it Matters

In September 1980, Congress enacted the Regulatory Flexibility Act (RFA)¹, which mandated that agencies consider the impact of their regulatory proposals on small entities, analyze equally effective alternatives, and make their analyses available for public comment.

The law was not intended to create special treatment for small business. Congress intended that agencies consider impacts on small business to ensure that, in their efforts to fulfill their public responsibilities, their regulatory proposals did not have unintended anticompetitive impacts and that agencies explored less burdensome alternatives that were equally or more effective in resolving agency objectives.

In March 1996, amendments to the RFA, in the form of the Small Business Regulatory Enforcement Fairness Act² (SBREFA) became law. SBREFA raised the stakes for regulatory agencies. Congress had finally been persuaded by 15 years of uneven compliance with the RFA, and by the repeated urging of the small business community, to authorize the courts to review agency compliance with the RFA. “Judicial review” was thought to be the incentive that was lacking in the original statute. SBREFA also reinforced the RFA requirement that agencies reach out and consider the input of small businesses in the development of regulatory proposals, subjecting this outreach to judicial review as well.

One of the clearest examples of how benefits can be derived from efforts to ensure compliance with the RFA comes from the Department of Transportation (DOT). To implement provisions of the Americans with Disabilities Act, DOT proposed a regulation in March 1998 that would have required all motor carriers, tour bus operators, and other transportation companies to provide access for people with disabilities, primarily by installing mechanical lifts. Advocacy advised DOT that its proposed rule would have a serious impact on the small bus industry and would cause these small businesses to reduce transportation services to the entire public, including the disabled (the opposite consequence of DOT’s intention).

DOT staff and representatives of the affected small businesses met to discuss the regulation and its alternative, an important step in the DOT’s RFA analysis. The meeting

A Brief History of Federal Regulatory Flexibility Legislation

Federal Regulatory Flexibility in Action

¹Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 USC § 601 et seq.)

²Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 USC § 601 et. seq.)

Regulatory Flexibility and the States

provided a meaningful opportunity for small businesses to discuss cost projections and other data relevant to the proposed rule. After the DOT met with Advocacy and small carriers, they published a final rule adopting an innovative approach recommended by small bus operators. The revised rule, published in September 1998, not only achieved the agency's objectives, but also struck a sensible balance. Essentially, DOT backed away from mandating a one-size-fits-all proposal and transitioned the redesign of all buses to accommodate passengers with disabilities while maintaining service for those who rely on small bus companies. Small businesses welcomed DOT's final rule, expected to save the small bus industry about \$180 million while guaranteeing transportation for the disabled.

The great need for reduced economic impact on small businesses does not stop at the federal level. More than 93 percent of businesses in every state are small businesses (see chart).³ Therefore, small businesses should be protected from state regulations that require them to bear disproportionate costs and burdens. Small employers can help fix problems if they have a voice in the process!

In a survey of state legislation, the Office of Advocacy found that many states lack legislation that allows for regulatory flexibility.⁴ Of the states that do have some form of regulatory flexibility, many are missing key legislative components. Advocacy has drafted model legislation to help state legislators create a structure in which small businesses can have meaningful input in the development of state policies and rules.

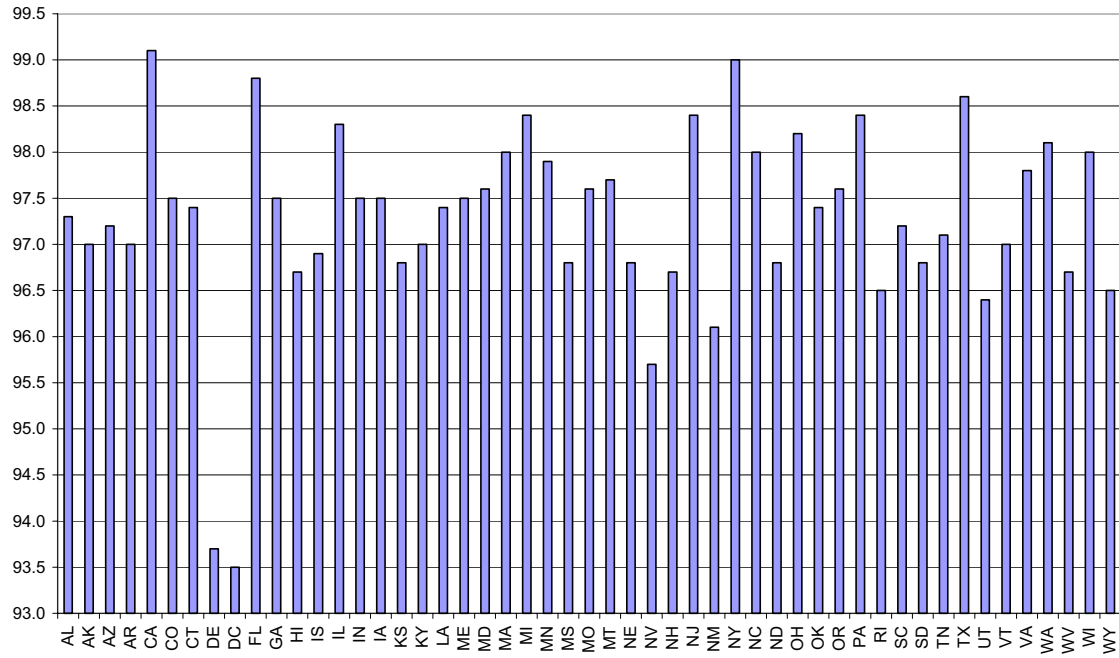
Aware of the state economic benefits of less burdensome regulations, the Office of Advocacy wants to build on the successes of federal regulatory flexibility and of states that have led the way with legislative and executive approaches of their own. In fiscal year 2001 the cost savings to small businesses from federal regulatory flexibility was more than \$4.4 billion.⁵ The Office of Advocacy urges state policymakers to enact regulatory flexibility legislation or amend current legislation in order to pass on similar cost savings to state economies.

³The information in this chart is taken from the *2002 Small Business Profiles* published by the Small Business Administration Office of Advocacy (<http://www.sba.gov/advo/stats>) from data collected by the U.S. Dept. of Commerce, Census Bureau. The chart excludes Guam, Puerto Rico, and Virgin Islands because no data were available.

⁴See *Regulatory Flexibility Legislation in the States*, *infra*.

⁵See *Annual Report of the Chief Counsel for Advocacy on the Implementation of the Regulatory Flexibility Act, Fiscal Year 2001* (<http://www.sba.gov/advo/laws/flex/>)

Percentage of Businesses that are Small



A BILL

To improve state rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small businesses.

Findings

- (1) A vibrant and growing small business sector is critical to creating jobs in a dynamic economy;
- (2) Small businesses bear a disproportionate share of regulatory costs and burdens;
- (3) Fundamental changes that are needed in the regulatory and enforcement culture of state agencies to make them more responsive to small business can be made without compromising the statutory missions of the agencies;
- (4) When adopting regulations to protect the health, safety, and economic welfare of [State], state agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on small employers;
- (5) Uniform regulatory and reporting requirements can impose unnecessary and disproportionately burdensome demands including legal, accounting, and consulting costs upon small businesses with limited resources;
- (6) The failure to recognize differences in the scale and resources of regulated businesses can adversely affect competition in the marketplace, discourage innovation, and restrict improvements in productivity;
- (7) Unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;
- (8) The practice of treating all regulated businesses as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental, and economic welfare legislation;
- (9) Alternative regulatory approaches which do not conflict with the stated objective of applicable statutes may be available to minimize the significant economic impact of rules on small businesses;

(10) The process by which state regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, to examine the impact of proposed and existing rules on such businesses, and to review the continued need for existing rules.

Section 1. Short Title

This act may be cited as the Regulatory Flexibility Act of [2003].

Section 2. Definitions

(a) As used in this section:

(1) “Agency” means each state board, commission, department, or officer authorized by law to make regulations or to determine contested cases;

(2) “Proposed regulation” means a proposal by an agency for a new regulation or for a change in, addition to, or repeal of an existing regulation;

(3) “Regulation” means each agency statement of general applicability, without regard to its designation, that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior regulation, but does not include (A) statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public, (B) declaratory rulings, or (C) intra-agency or interagency memoranda;

(4) “Small business” means a business entity, including its affiliates, that (A) is independently owned and operated and (B) employs fewer than [five hundred] full-time employees or has gross annual sales of less than [six] million dollars.

Section 3. Economic Impact Statements

(a) Prior to the adoption of any proposed regulation that may have an adverse impact on small businesses, each agency shall prepare an economic impact statement that includes the following:

(1) An identification and estimate of the number of small businesses subject to the proposed regulation;

(2) The projected reporting, recordkeeping and other administrative costs required for

compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record;

(3) A statement of the probable effect on impacted small businesses;

(4) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

Section 4. Regulations Affecting Small Businesses

(a) Prior to the adoption of any proposed regulation on and after [January 1, 2003], each agency shall prepare a regulatory flexibility analysis in which the agency shall, where consistent with health, safety, and environmental and economic welfare, consider utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small businesses. The agency shall consider, without limitation, each of the following methods of reducing the impact of the proposed regulation on small businesses:

(1) The establishment of less stringent compliance or reporting requirements for small businesses;

(2) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

(3) The consolidation or simplification of compliance or reporting requirements for small businesses;

(4) The establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and

(5) The exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

(b) Prior to the adoption of any proposed regulation that may have an adverse impact on small businesses, each agency shall notify the [Department of Economic and Community Development or similar state department or council that exists to review regulations] of its intent to adopt the proposed regulation. The [Department of Economic and Community Development or similar state department or council that exists to review regulations] shall advise and assist agencies in complying with the provisions of this section.

Section 5. Judicial Review

(a) For any regulation subject to this section, a small business that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of this section.

(b) A small business may seek such review during the period beginning on the date of final agency action and ending one year later.

Section 6. Periodic Review of Rules

(a) Within four years of the enactment of this law, each agency shall review all agency rules existing at the time of enactment to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of those statutes, to minimize economic impact of the rules on small businesses in a manner consistent with the stated objective of applicable statutes. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, the agency shall publish a statement certifying that determination. The agency may extend the completion date by one year at a time for a total of not more than five years.

(b) Rules adopted after the enactment of this law shall be reviewed within five years of the publication of the final rule and every five years thereafter to ensure that they minimize economic impact on small businesses in a manner consistent with the stated objectives of applicable statutes.

(c) In reviewing rules to minimize economic impact of the rule on small businesses, the agency shall consider the following factors:

- (1) The continued need for the rule;
- (2) The nature of complaints or comments received concerning the rule from the public;
- (3) The complexity of the rule;
- (4) The extent to which the rule overlaps, duplicates, or conflicts with other federal, state, and local governmental rules; and
- (5) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

Regulatory Flexibility Legislation in the States

The Office of Advocacy surveyed state legislation looking for existing regulatory flexibility laws. While 35 states and Puerto Rico have some legislation that pertains to small business regulations, many of those states are missing key components that give regulatory flexibility its effectiveness. Advocacy identified five areas in which current state legislation is either lacking or the usefulness of the regulatory flexibility provision is weakened:

Small Business Definition

Every single state has some variety of an administrative procedures act governing regulatory protocol. Advocacy looked to see whether the state had any legislation specifically crafted for small business regulations and what the state defined as small business.

Economic Impact Analysis

One of the critical parts of any regulatory flexibility scheme is understanding the economic impact of regulations as they relate to small businesses. Advocacy looked for legislation that required agencies to submit or otherwise research the impact of the proposed regulations on small businesses.

Examining Alternatives

In addition to examining the economic impact, agencies need to be proactive in looking for regulatory solutions that do not unduly burden small businesses. Advocacy looked for language that required agencies to examine regulatory alternatives and give reasons why such alternatives could not feasibly be implemented.

Judicial Review

A lesson from the federal level is that judicial review of enacted regulations that do not comply with regulatory flexibility legislation is critical. Without judicial review, agencies may not conduct a thorough and well-reasoned regulatory flexibility analysis. Advocacy looked for legislation that afforded judicial review either in the courts or through administrative review committees.

Exemptions

Even the best regulatory flexibility legislation has little value if the majority of state agencies are exempted from it. Advocacy looked at any legislation that gave exceptions or exemptions for certain types of regulations and/or agencies.

The following table shows which states have regulatory flexibility legislation and specifically, if they have any of the above characterized components.

State ¹	Small Business Definition	Economic Impact Analysis	Examining Alternatives	Judicial Review	Exemptions
Alabama					
Alaska					
Arizona	41-1001(19)	41-1052; 41-1055; 41-1056.01	41-1055	41-1034; 41-1051; 41-1052	41-1057; 41-1005; 41-1044
Arkansas					
California Gov. Code	11342.610	11346.2; 11346.3; 11346.9	11346.2; 11347.6	11349; 11350	11346.1; 11353; 11356; 11361
Colorado					
Connecticut	4-168a(a)(2)	4-168a(c)	4-168a(b)	4-175; 4-183	4-168a(d)
Delaware	10403(3)	10404	10404		
Washington DC					
Florida	120.54(3)(b) (2)(a); 120.52(16) & (17)	120.54(3)(b) (1) and (2)	120.54(1)(d); 120.54(3)(b) (2)(a); 120.541	120.68; 120.545; 120.56	120.50; 120.63; 120.80; 120.81
Georgia	50-13-4(a)(3)	50-13-4(a)(3) & (4)	50-13-4(a)(3)	50-13-19; 50-13-10; 50-13-13; 50-13-20	50-13-4(b)
Guam 5 GCA		9301 ²		9309	
Hawaii ³	201M-1	201M-2	201M-2	201M-6	
Idaho					
Illinois 5 ILCS § x	100/1-75; 100/1-80; 100/1-85	100/5-30(c)	100/5-30(a)		
Indiana		4-22-2-28 ⁴			
Iowa		17A-4A ⁵		17A-19	
Kansas					
Kentucky	13A.210(5); 13A.010	13A.240 ⁶	13A.210	13A.337	

¹ Any notation under a state's name is the relevant citation information for the laws cited within the chart.

² The economic impact analysis provision in Guam's Administrative Procedure Act considers the economic impact of regulations on businesses as a whole, not small businesses.

³ The Hawaii regulatory flexibility legislation was recently amended. Until statute books and databases can be updated, read the amended statute at Hawaii's website:

http://www.capitol.hawaii.gov/hrscurrent/Vol04_Ch0201-0257/HRS0201M/HRS_0201M-.htm

⁴ The economic impact analysis provision in Indiana's Administrative Procedure Act considers the economic impact of regulations on businesses as a whole, not small businesses.

⁵ Iowa repealed its small business regulatory flexibility statute in 1998 (see 17A.31). The statute cited here allows for a regulatory flexibility analysis, which includes an economic impact analysis and an examination of alternatives, if it is *requested* by the Administrative Rules Coordinator or the Administrative Review Committee. An interested party can petition the ARC or ARRC to request a regulation be reviewed, but it is ultimately the ARC/ARRC who decides whether or not to request such an analysis (see 17A.7).

⁶ The economic impact analysis provision in Kentucky's Administrative Procedure Act considers the economic impact of regulations on businesses as a whole, not small businesses.

State¹	Small Business Definition	Economic Impact Analysis	Examining Alternatives	Judicial Review	Exemptions
Louisiana					
Maine 5 MRS § x	8052(5-A)		8052(5-A)	8058; 11001; 8072	8054
Maryland St. Govt		10-124 ²		10-222; 10-125	
Massachusetts		30A-5	30A-5	30A-7	
Michigan	24.207a	24.240; 24.245	24.240	24.264; 24.301	24.315
Minnesota		14.131 ³	⁴	14.69	14.03
Mississippi		25-43- 6(2)(d)	25-43-6(2)(g)	25-43-17	25-43-6(4)
Missouri		⁵			
Montana					
Nebraska					
Nevada	233B.0382	233B.0608; 233B.0609	233B.0608; 233B.0609	233B.105; 233B.110; 233B.130	
New Hampshire	541- A:5(IV)(e)	541- A:5(IV)(e)		541-A:13; 541-A:24	541-A:21
New Jersey	52:14B-17; 52:14B-25	52:14B-19; 52:14B-25	52:14B-18; 52:14B-25		
New Mexico					
New York NY CLS St. Admin P Act § x	102(8)	202-b(2)	202-b(1)	205	202-b(3)
North Carolina					
North Dakota					
Ohio	121.24(A)(9) & (10)	121.24(E); 127.18			121.24(F)
Oklahoma 75 Okl. St. § x	502(4)	504	504	505	
Oregon			183.540	183.090; 183.480	
Pennsylvania 71 P.S. § x		745.5(9) & (10) ⁶	745.5(11) & (12)	745.12a	
Puerto Rico H.B. 3038, No. 454	§2(c) & (d)	§4	§4	§11	

¹ Any notation under a state's name is the relevant citation information for the laws cited within the chart.

² The economic impact analysis provision in Maryland's Administrative Procedure Act considers the economic impact of regulations on businesses as a whole, not small businesses.

³ The economic impact analysis provision in Minnesota's Administrative Procedure Act considers the economic impact of regulations on businesses as a whole, not small businesses.

⁴ Minnesota has legislation that allows adversely affected small businesses to apply for a variance (exemption or other alternative) from an existing regulation if it can show economic hardship, among other factors. Applying for a variance costs, at a minimum, \$10 (see 14.055 and 14.056).

⁵ Missouri examines the economic impact of *bills* on small businesses, not regulations (see 23.140).

⁶ The economic impact analysis provision in Pennsylvania's Administrative Procedure Act considers the economic impact of regulations on businesses as a whole, not small businesses

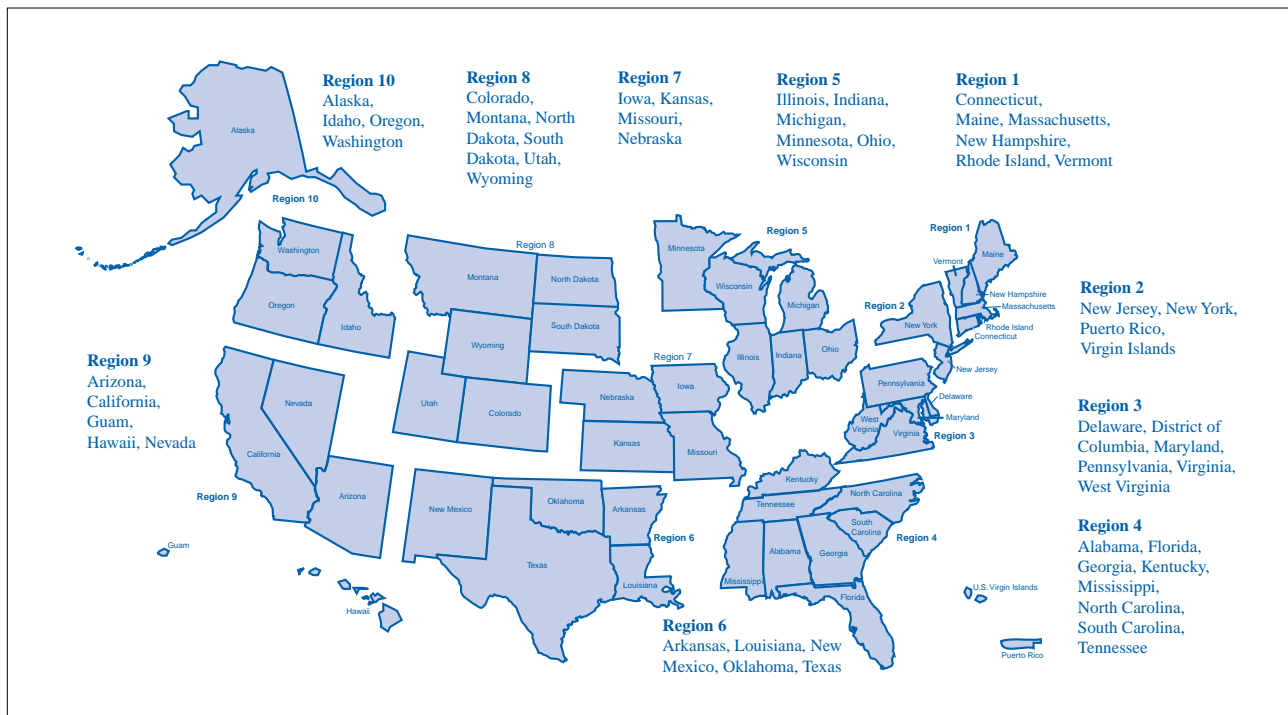
State¹	Small Business Definition	Economic Impact Analysis	Examining Alternatives	Judicial Review	Exemptions
Rhode Island	42-35-1(i)	42-35-3(4)	42-35-3(4)	42-35-15; 42-35-7	
South Carolina		1-23-10(7); ² 1-23-115		1-23-380; 1-23-120	
South Dakota					
Tennessee					
Texas Govt Code	2006.011; 2006.001	2006.002	2006.002	2006.013	2006.012
Utah		63-46a- 4(5)(1) ³			63-46a-12.1; 63-46a-11
Vermont	3-801(12)	3-838	3-832	3-815	3-816; 3-832
Virgin Islands					
Virginia					
Washington	19.85.020	19.85.030; 19.85.040	19.85.030		
West Virginia					
Wisconsin	227.114(1)(a)	227.114(2)	227.114(2)	227.52; 227.40	227.24
Wyoming					

¹ Any notation under a state's name is the relevant citation information for the laws cited within the chart.

² The economic impact analysis provision in South Carolina's Administrative Procedure Act considers the economic impact of regulations on businesses as a whole, not small businesses.

³ The economic impact analysis provision in Utah's Administrative Procedure Act considers the economic impact of regulations on businesses as a whole, not small businesses.

Small Business Administration Office of Advocacy Regional Advocates



The Chief Counsel's Direct Link

The relationship between the nation's small businesses and the Chief Counsel for Advocacy is strengthened by regional advocates located in the SBA's 10 regions. They are the Chief Counsel's direct link to small business owners, state and local government bodies, and organizations that support the interests of small entities. The regional advocates help identify regulatory concerns of small business by monitoring the impact of federal and state policies at the grassroots level. Their work goes far to develop programs and policies that encourage fair regulatory treatment of small business and help ensure their future growth and prosperity.

Please contact these advocates for assistance and guidance in implementing the model legislation in your state. They are a great source for state small business information and are ready and willing to assist!

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